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IN CHHATTISGARH HIGH COURT OF JUDICATURE AT BILASPUR.

CRIMINAL APPEAL NO. 366/2001.

APPELLANT (IN JAIL)

Atami Laxman son of Kante Muriya aged about 38 years, cultivator, resident of village Chhindnar Bazar-para P.S.Geedam District Dantevada (Chhattisgarh)

VERSUS

RESPONDENT

State of Chhattisgarh
Through: P.S.Geedam
Distt.Dantevada

APPEAL UNDER SECTION 374 CR.P.C.

(6024) -2001 ..... Advocate

CONVICTION

SENTENCE

(30) APR

HIGH COURT OF CHHATTISGARH, BILASPUR

D.B: HON'BLE SHRI L.C. BHADOO, Ag.C.J.
HON'BLE SHRI SUNIL KUMAR SINHA, J

Criminal Appeal No.366 of 2001

Atami Laxman

Vs.

State of Chhattisgarh

Judgment for consideration

Sd/-
SUNIL KUMAR SINHA
Judge

Hon'ble the Acting Chief Justice

Post for Judgment: 9.01.2007

Sd/-
L.C. BHADOO
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

D.B: HON'BLE SHRI L.C. BHADOO, Ag.C.J.
HON'BLE SHRI SUNIL KUMAR SINHA, J

Criminal Appeal No.366 of 2001

Atami Laxman

Vs.

State of Chhattisgarh

Appearance:

Smt. Nisha Chaturvedi, counsel for the appellant.

Shri U.N.S. Deo, Additional Public Prosecutor, for the State.

JUDGMENT
(9.01.2007)

Following judgment of the Court was delivered by

Sunil Kumar Sinha, J,

(1) This appeal is directed against the judgment of conviction and order of sentence dated 23.2.2001 passed by the Sessions Judge, Bastar at Jagdalpur in Sessions Trial No.128/2000 whereby the appellant has been convicted u/s 302 IPC and sentenced to undergo imprisonment for life.

(2) The allegations are that at about 9 p.m. on 01.2.2000, the appellant committed murder of deceased Atami Bachnu, a boy aged about 5 year. The deceased was son of Atami Sonaru (P.W.1) and the accused/appellant is son of uncle of Atami Sonaru. Atami Sonaru (P.W.1) was having two sons. The deceased was his elder son. On the contrary, the accused was having no male issue as he was having four daughters. The case of the prosecution is that the accused/appellant was having suspicion that his cousin brother i.e., Atami Sonaru (P.W.1), has done some witchcraft against him, due to which, he is not getting any male child. Just one day prior

to the date of incident i.e., on 31.1.2000, the accused came to the house of the complainant-Atami Sonaru (P.W.1) and on this pretext, he had a quarrel with him. It is alleged that he was making allegations against the complainant that the complainant is having two sons and the accused is getting only the daughters because of the witchcraft done by the complainant, and during the quarrel, the accused had said in anger that he will kill the son of the complainant. The further case of prosecution is that on the next day i.e., on 01.2.2000 at about 9.00 p.m., the complainant (P.W.1) and his wife Atami Dewali (P.W.2) were sleeping in the verandah of their house after taking their meals and their son Atami Bachnu, since deceased,was also sleeping with them. At that time, the appellant came over there alongwith a Tangia in his hands and assaulted the deceased on his chest from the back portion of Tangia. The deceased Atami Bachnu died on the spot. The appellant ran away towards his house alongwith Tangia. The incident was witnesses by three ocular witnesses namely, Atami Sonaru (P.W.1), Atami Dewali (P.W.2) and Smt. Sukdi, mother of Atami Sonaru. P.W.1 and P.W.2 had chased the appellant but they could not get him. This incident was narrated by P.W.1 to Sukul Ram (P.W.3), Tulsiram (P.W.4) and Kotwar, Patel and Sarpanch of the village. On the next morning, there was a village Panchayat and the accused was called in the said Panchayat, but since the accused had absconded from the village, he could not be brought to Panchayat and thereafter, on 02.2.2000 at about 2.10 p.m., Atami Sonaru (P.W.1) lodged report in police station vide Ex.P-1. A merg intimation was recorded vide Ex.P-5 and ultimately the investigation commenced. The concerned S.H.O.

namely Narayan Othi (P.W.5) left for the place of occurrence on 2.2.2000. He prepared inquest on the body of the deceased under Ex.P-6 and by requisition Ex.P-7, he sent the dead body for the post-mortem examination to Primary Health Center, Geedam and site plan of place of occurrence was prepared under Ex.P-8. On the next day, i.e. 3.2.2000, the accused/appellant was taken into custody and his statement u/s 27 of the Evidence Act was recorded vide Ex.P-9 on which a Tangia was seized from the place indicated by him vide Ex.P-3. During the course of investigation, it also came to the notice of the Investigating Officer, that due to previous incident of *Marpit* between the accused/appellant and the complainant, the accused had received certain injuries, therefore, the accused was also sent for medical examination under requisition (Ex.P-10), on which, a report (Ex.P-13) was received. Dr. H.L. Thakur (P.W.6) had conducted autopsy on the body of the deceased, who found that there was swelling in the stomach and there was a lacerated wound on the middle of the chest (sternum) admeasuring 1" x ¼" x ½". On the internal examination, he found that there was fracture of sternum and there were fractures of right 3rd 4th and 5th ribs and there was rupture of heart also. According to the opinion of the Doctor, this injury was caused by hard and blunt object and it was caused within 20-24 hours from the time of examination. The autopsy surgeon opined that the death was due to excessive hemorrhage and shock and the nature of death was homicidal. He has proved his report as Ex.P-11.

(3) After completion of the investigation, the charge sheet was filed in the Court of Chief Judicial Magistrate, Dantewada ,who in

turn committed the case to the Court of Sessions where the trial commenced.

(4) The learned Sessions Judge after framing charges and recording the evidence of prosecution witnesses, held the appellant guilty of the offence punishable under section 302 of the I.P.C., and sentenced him to undergo imprisonment for life. It is against this judgment passed by the Sessions Judge, the appellant has filed this appeal.

(5) The conviction of the appellant is based upon the testimonies of P.W.1 Atami Sonaru and P.W.2 Atami Dewali who are the eye witnesses and whose evidence are corroborated by Dr.H.L. Thakur (P.W.6).

(6) Learned counsel for the appellant argued that the version of the eye-witnesses is not reliable and the conviction based upon their testimonies is not sustainable. Her submission was that the two eye witnesses are saying that appellant had given 3 *Tangia* blows to the deceased whereas the postmortem report shows only one injury on the person of the deceased, therefore, the version of the eye-witnesses should be disbelieved.

(7) We have heard learned counsel for the parties at length and have also perused the records of the Sessions Case.

(8) Atami Sonaru (P.W.1), who is the father of the deceased, has stated that on the date of incident, he was sleeping in the verandah of his house alongwith his wife and children. At about 8 p.m., the accused entered into the house and assaulted his son with a Tangia. He could identify the accused/appellant through the light of hearth, which was burning near the place of occurrence. He stated that he had chased the appellant but he

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could not catch him. He has further stated that his son received two Tangia blows on his chest and one Tangia blow on his back. He also stated about narrating the story to Sarpanch, Kotwar and Patel and has also stated about holding of a Panchayat in the village on next morning saying that the appellant did not turn up to Panchayat as he was absconding from the village. He admitted to have lodged the report with the Police Station vide Ex.P-1. In the cross examination, it was suggested that there was no light in the room, therefore, he could not identify the assailant, but this fact has been denied by the witness and he stated that he could identify the accused/appellant in the light of burning hearth in the verandah and had also seen the appellant assaulting his son. P.W.2 Atami Dewali has also deposed almost similar facts which have been deposed by her husband (P.W.1). She also stated that when all of them were sleeping in the Verandah of the house, the accused appellant came over their and assaulted the deceased with the help of Tangia. She stated that his son had received injuries on his chest and back and he died on the spot. She further stated that she alongwith her husband had chased the appellant but they could not catch him and he ran away from their house. She has specifically stated that she could identify the appellant as the assailant in the light of a small lamp (*Chimni*) which was glowing in the verandah and also in the light of hearth which was burning in verandah at the time of incident. In her cross examination, she has stated that she had seen the appellant giving 3 Tangia blows to the deceased. In the cross examination of these two witnesses, the defence has not been able to bring any such fact, which may be

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sufficient to discredit the evidence of these witnesses regarding identification of the appellant.

(9) The only point raised by learned counsel for the appellant is about the discrepancy in the medical evidence and ocular testimony. She reiterated that both the eye witnesses are saying that the accused had inflicted 3 Tangia blows to the deceased but the autopsy surgeon recorded only one injury. She refers to the judgment of the Apex Court rendered in the matter of ***State of Punjab –Vs- Sucha Singh and others 2003(2) Apradh Nirnay Journal (Supreme Court) Pg. 185*** In the said case the deceased had received as many as 24 injuries by various weapons held by 3 accused persons and the testimony of P.W.4 and P.W.5 were doubted and benefit was given by the High Court and the accused persons were acquitted which was upheld by the Supreme Court. The Supreme Court has doubted the presence of these witnesses on the place of occurence, not only, on the basis of the discrepancy between their evidence and medical evidence with regard to the injury sustained by the deceased on his body, but also considering the circumstance that inflicting 24 injuries on the body of the deceased by the three accused persons would require a considerable amount of time and this itself suggests that the accused had sufficient time at their disposal to commit the crime and any father worth the name would not remain a mute spectator when his son is being inflicted as many as 24 injuries at his very nose.

(10) In the present case, there can hardly be any doubt regarding presence of the eye witnesses, P.W.1 and P.W.2, at the place of occurrence, because, admittedly, they are the father and mother of

the deceased and they are bound to remain present in their house in the night alongwith their small children. The only question comes as to whether they are falsely implicating the accused/appellant? As the evidence comes in this case, a quarrel took place one day prior to the date of incident between the accused/appellant and P.W.1 on the pretext that the accused was having only daughters and P.W.1 was having sons and that in the said quarrel, the accused appellant threatened that he will kill the son of the complainant. Not only this, subsequent to the date of incident, in the next morning, when a village Panchayat was conducted and the appellant was called for the said Panchayat, he could not be brought to the Panchayat as he has absconded from the village. These are the two circumstances, which are couple with the version of the eye-witnesses and which are relevant for the purpose of just decision of this case. Why the complainant and his wife will falsely implicate the appellant. There can be a motive with the appellant to kill the son of the complainant or to beat the complainant, but there was no reason with the complainant to falsely implicate the appellant as he was no grievance against him.

(11) More over, if we see the nature of injury received by the deceased, it would appear that this injury was lacerated wound in size of 1" x ¼" x ½" on the center of sternum, due to which, there was fracture of sternum and fracture of 3rd, 4th and 5th right ribs. It may be a case that repeated blows may have been received at the same place or any of the blows may not have touched the body and it may not have caused any external injury to the deceased.

(12) The law laid down by the Apex Court in the matter of State of *Punjab –vs- Sucha Singh (supra)* doubting the presence of the two

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eye witnesses on account of discrepancy between the medical evidence and ocular testimony coupled with many other grounds referred to in the said judgment, cannot be made strictly applicable to this case because in case on hand, the presence of these witnesses cannot be doubted and further their evidence is corroborated by two other circumstances i.e., one about the quarrel and threatening which took place one day prior to the date of incident and the other about abscondence of the appellant.

(13) It has been held by the Supreme Court in the matter of ***State of U.P. -vs- Krishna Gopal and another, (1988) 4 SCC 302*** and further in ***Ramakant Rai -vs- Madan Rai and others AIR 2004 S.C. 77*** that "where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Importance and primacy should be given to the orality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scale for a cumulative evaluation."

(14) Therefore, it is clear that the eye witness testimony may contain inaccuracies and exaggerations; there may be errors or

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omissions on account of lapse of memory or poor power of observations or inability to recount and recite accurately. Sometimes, doctors also may not bestow sufficient care while performing examination or preparing records and their opinion may be based on inadequate or incomplete or defective examination or lack of complete knowledge. It is indeed not fair to expect a total correspondence between these two items of evidence. Court must carefully examine the discrepancies and if it is reasonably possible to arrive at the substantial and true version. Court should not throw out the prosecution case on the basis of such discrepancies. Accuracy of medical witnesses and ocular witnesses depends upon several factors. Inconsistency is not sufficient to discredit an eye witness. Sometimes an eye witness may allege a blow or stab etc., but there may not be corresponding injuries. The possibility of weapon not actually striking and not causing injury cannot be ruled out. Eye witness may err in details like direction or the blow etc. Inconsistency regarding such details between the two items of evidence may not be important. There may be discrepancies regarding the weapon or manner of attack. If the eye witness testimony is clear and convincing, discrepancies cannot matter. Doctor is a witness of both fact and opinion. Medical evidence acts as a check upon testimony of eye witness; it is also independent evidence in so far as it establishes facts e.g., tattooing marks, nature and dimensions of injury etc. Medical evidence is also corroborative of eye witness testimony, in as much as it may show that the injury might have been caused in the manner alleged. Defence could use the medical evidence to show that the injury could not have been caused as alleged and thereby

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discredit eye witness testimony. However, unless the medical evidence goes so far that it completely rules out all possibility whatsoever of the injuries taking place in the manner alleged by the eye witness, the prosecution version cannot be thrown out on the ground of alleged inconsistency between the two items of evidence. Court has to remember that medical evidence is mainly opinion evidence on which the court could form its own independent conclusion. In case of divergence, the Court must try to reconcile the two; if that is not possible the court has to appreciate the evidence like any other evidence, having regard to reasons and data provided by the Doctor and the cogency or otherwise of eye witness testimony. If eye witnesses are credible and trustworthy, medical opinion suggesting alternative possibility may not be accepted as conclusive. Primacy should be given to oral evidence.

(15) In the facts and circumstances of this case, if we examine the testimony of the eye-witnesses i.e., father and mother of the deceased namely Atami Sonaru (P.W.1) and Atamai Dewali (P.W.2), in light of the above prepositions of law, it inspires confidence of this Court and their testimony is corroborated by two other circumstances - one the quarrel which took place prior to the date of incident in which the accused/appellant threatened the complainant to kill his son and the other that after the date of incident, he absconded from the village. They are further coupled with the discoveries of weapon of offence at the instance of the accused and the testimony of these witnesses cannot be doubted merely on the ground that the Doctor has recorded only one injury,

particularly, in light of the nature of injury recorded by the doctor and we hold it accordingly.

(16) In view of the above, we are of the considered opinion that the prosecution has been able to establish the involvement of the accused in crime in question beyond all reasonable doubt based upon the oral testimony of ocular witnesses i.e., P.W.1 and P.W.2 who are father and mother of the deceased. The trial Court has not committed any illegality or irregularlity in arriving at conclusion holding the accused appellant guilty of commission of offence u/s 302 IPC.

(17) In the result, the appeal being devoid of merits, is liable to be dismissed and is accordingly dismissed.

Sd/-
ACTING CHIEF JUSTICE

Sd/-
SUNIL KUMAR SINHA
Judge

/Rao/